No. 5019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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O. L. SHAFTER ESTATE COMPANY, a corporation,
Plaintiff in Error,

vs.

W. T. MOONEY, Trustee in Bankruptcy of the Estate of William Bartholomew, Bankrupt,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

REUBEN G. HUNT,
703 Market Street, San Francisco,
Attorney for Defendant in Error.

Parker Printing Company, 523 Clay Street, San Francisco

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STATEMENT OF FACTS.

This is an appeal from a judgment of the United States District Court for the Northern District of California in favor of a trustee in bankruptcy in an action to recover a transfer of money alleged to be a voidable preference under the provisions of Sec. 60-a-b of the Bankruptcy Act.

All of the elements of a voidable preference were conceded by the defendant, with a single exception,

that is to say, it was conceded, that if the money transferred was the property of the bankrupt, the transfer occurred within four months of the commencement of the bankruptcy proceedings, that the bankrupt was insolvent at the time of the transfer, that the effect of the transfer will be to enable the defendant to secure a greater percentage of its debt as of the date of the transfer than other creditors of the same class, and that the defendant had reasonable cause to believe that the bankrupt was insolvent at the time of the transfer and that the effect of the enforcement of the transfer will be as indicated; but it was denied by the defendant in its answer that the property transferred was the property of the bankrupt, and so the trial centered around this issue:

Was the property covered by the transfer the property of the bankrupt and was his estate diminished by such transfer?

The facts were not very much in conflict, and it is with respect to the inferences to be drawn from these facts that we are mostly concerned. And, upon familiar principles, it will be presumed by the appellate court that findings of fact by the court below were correct if there is any substantial legal evidence upon which it may be seen that the findings of fact in question aided by every reasonable inference, could, with reason, have been based. (3 Cyc. 308 and cases cited.)

Briefly, the facts were these: William Bartholomew, the bankrupt, leased from the O. L. Shafter Estate Company, under a written lease, the "N" Ranch near

Inverness, Marin County, California, and certain cows and heifers thereon, for a term of one year commencing Oct. 1, 1924, and ending Sept. 30, 1925, at a rental of $2500 plus a certain number of calves which might be born during the year (Trans., p. 14). Towards the end of the term, Bartholomew was behind about $1400 on his rent (Trans., p. 25) and there was a claim against him by the landlord of $300.00 for calves lost in a storm (Trans., p. 27). He owned the equipment on the ranch, that is to say, the horses, wagons, milking machines, dairy utensils, engine, etc. (Trans., p. 27).

Bartholomew planned to sell out his property and pay up the back rent and leave the place when the lease expired (Trans., p. 25). W. T. Hall told Bartholomew about two weeks before the lease expired that he wanted to take over the ranch and they agreed upon a price of $6500 for Bartholomew's property. A few days before the lease was up, Bartholomew asked Hall for a deposit which he refused to give and so Bartholomew told Hall the deal was off (Trans., p. 25). The morning after the lease expired, Hall went out to the ranch and told Bartholomew that he would not pay $6500.00 but would pay $4500.00. A little later in the morning Bartholomew met Hall at the residence of L. C. Eastman, the superintendent of the O. L. Shafter Estate Company, and there agreed to let Hall have his property for $4500.00 (Trans., p. 26). The O. L. Shafter Estate Company made it plain to Hall and Bartholomew that they would not give Hall

a new lease unless the $1400 back rent due from Bartholomew, and the claim of $300 for the loss of calves, was paid, and this was understood by them (Trans., pp. 27, 50). Hall did not want Bartholomew's equipment without the lease (Trans., p. 50) and it was necessary for Bartholomew to sell to Hall in order to realize full value for his property, for, otherwise, the property if removed from the ranch and sold elsewhere would not bring 50% of its value (Trans., p. 60).

Hall and the O. L. Shafter Estate Company had some negotiations respecting the amount of rent that Hall was to pay under the new lease. Hall wanted to pay only $2200.00 per year, instead of the $2500.00 paid by Bartholomew, on account of the run-down condition of the ranch, which run-down condition was conceded by everybody (Trans., pp. 41, 42, 50, 56, 57). This rent was accepted by the landlord, but the company tacked on as "consideration for the lease," $1764.25, to cover $1464.25 unpaid rent due from Bartholomew, and the $300.00 item testified by Bartholomew to be for loss of calves and by C. W. Slack, the vice-president and general manager of the O. L. Shafter Estate Company, to be for the difference in rental between the amount paid by Bartholomew the previous year and the amount to be paid by Hall. (Trans., pp. 27, 43, 56, 59, 62, 63).

At the conference at Eastman's house, Hall, with the consent of Bartholomew, paid Eastman for the Shafter Estate Company the $1764.25 to cover the

back obligations of Bartholomew to the company, and then they went over to the Martinelli's store and there agreed that the balance should be an even sum of $2800, and this money was turned over to Bartholomew's creditors (Trans., pp. 27, 35, 44, 45, 47, 52, 53).

At a subsequent meeting of the creditors, L. C. Eastman did not make any claim on behalf of the O. L. Shafter Estate Company against the $2800.00 (Trans., p. 48), nor did C. W. Slack (Trans., p. 62). The company owned other ranches in the same vicinity and made many other leases, but never, in any other instance, exacted a cash consideration for the lease. (Trans., pp. 55, 61).

ARGUMENT.

The position of appellant is that the $1764.25 was paid by Hall as consideration for the lease and was never a part of Bartholomew's property, and that the said sum of $2800 was the total purchase price, and not $4564.25, paid by Hall to Bartholomew for the equipment on the ranch.

The position of respondent is that the total purchase price of the equipment was $4564.25, but that, in order to complete the deal, it was necessary for Bartholomew to permit Hall to pay the O. L. Shafter Estate Company $1764.25 of this amount to cover unpaid claims of the company against Bartholomew, for, otherwise, the company would not have given

Hall a lease, and Hall did not want the equipment without the lease. The labelling of this $1764.25 as "consideration for the lease" was merely a subterfuge in an attempt to legalize the receipt of this preference. This was the view adopted by the trial court.

We think that a brief digest of the evidence, so far as it is pertinent to the only issue in the case, viz.:

> **Was property of Bartholomew involved in the transfer and was his estate to which his general creditors had the right to look for the satisfaction of their claims diminished thereby?**

will serve, perhaps more than citation of authorities, to demonstrate that the effect of the transaction was the creation of an indirect preference in favor of the O. L. Shafter Estate Company. The courts will not permit a preference to be effected by indirection. Mere circuity of arrangement will not save a transfer which effects a preference from being invalid as such.

> *Dean v. Davis,* 242 U. S. 438; 61 Law Ed. 419; 37 Sup. Ct. Rep. 130; 38 Am. B. R. 664, affirming 31 Am. B. R. 808; 212 Fed. 88;
>
> *National Bank v. National Herkimer County Bank,* 225 U. S. 178, 184; 28 Am. B. R. 218; 56 Law. Ed. 1042, 1046; 32 Sup. Ct. Rep. 633.

This digest follows:

Digest of the Evidence.

"William Bartholomew

"Up to October, 1925, I resided at the 'N' Ranch, at Point Reyes, Marin County, California,

which I was leasing from the defendant under a written lease. (This lease is set out in full in the transcript, and provides for a term commencing Oct. 1, 1924, and ending Sept. 30, 1925, with a rental of $2500 plus some calves, Trans., pp. 14-24). I paid rent all the times I was there, for about three years, and I paid all the rent with the exception of $1400 odd. I dealt with L. C. Eastman, representing the Shafter Estate Company. He is the superintendent of the ranches up there. * * * He demanded payment of the rent. I told him I did not have the money. I was figuring on selling out and as soon as I sold out the place they would get their money. I owned all the equipment on the ranch, horses and wagons and milking machines and dairy utensils and engine and stuff. All they owned was the land, the cows and the buildings. * * *'' (Trans., pp. 24-25).

"W. T. Hall came to me first about two weeks before my lease was up and wanted to buy the ranch, so I sold the ranch for $6500. * * * He said he would take the ranch for $6500. * * * About two or three days before the lease was up Mr. Hall came out and I asked him for a deposit on the place, which he would not give me. He said that Mr. Eastman told him not to give me any money at all. I figured then that there was something wrong somewhere and I told him that I would not sell the place, so he went away. * * * So the next morning (after the lease was up) Mr. Hall came out to the ranch. He said: 'I cannot pay you the $6500.' * * * He said: 'All I can give you is $4500 for the ranch and the stuff' '' * * * (Trans., pp. 25-26).

"I went down that morning to Inverness, and I met Mr. Hall and Mr. Eastman down there. Mr. Eastman asked me to go to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him the place for the

money. I told him he might as well have it, I guess, or something like that, so Mr. Hall wrote out Mr. Eastman a check for some money. I did not see what it was. We went over to Mr. Martinelli's store and fixed everything in his store for $4500. After the $1700 was paid to Mr. Eastman there was $2760 left or something like that. Mr. Martinelli and I asked Mr. Hall if he would not make it out for $2800 even money. There was $1400 and some dollars for the rent and $300 for calves which were lost in the 1923 storm, and so he said he would make it for the $2800 even money. I did not see the check Mr. Hall gave Mr. Eastman, but it was supposed to be seventeen hundred and some dollars. In that conversation they were to get $1400 back rent which I owed and $300 for the calves before Mr. Hall could get the lease. That was said between Hall and Eastman and myself on that occasion'' (Trans., pp. 26-27).

''* * * Mr. Eastman told Mr. Hall, and of course I knew myself, that before anyone could take take over the ranch they had to pay that back rent of mine and that $300 for calves which they say that I either lost or stole. * * * Mr. Hall came to my place and wanted to know if I wanted to sell the place and I told him I did. He wanted to know what I wanted for the ranch and I told him that I wanted $6500. He asked me what I paid for the ranch and I told him I paid $6250 and I spent about $2500 for stuff I put on the place. * * * He came back a day or so later and was satisfied with the place and said he would take it at $6500. * * * There were 9 head of horses, about 50 or 55 head of hogs, 3 milking machines, a wagon, a Ford automobile truck. All of the stuff on the ranch that belonged to me was sold to him for $6500.'' * * * (Trans., pp. 30-31).

''Q. In other words, the deal for $6500 fell through because he would not pay you a deposit,

because Mr. Eastman had said not to pay any money to you, is that right? A. Yes'' (Trans., p. 33).

''The first talk about $4500 was on the morning after my lease was up. Mr. Hall came out to my place about 8 o'clock in the morning. * * * After a while he said: 'All the money I can raise is $4500.' * * * The first talk I ever had with Hall about $4500, the new price, was on the morning after the lease was up'' (Trans., p. 34).

''I saw Mr. Eastman the night before my lease expired, I think it was on September 30th. He told me that Mr. Hall was going out the next morning and take possession of the ranch and he told me to sell out to Mr. Hall as rapidly as possible'' (Trans., pp. 34-35).

''On the morning of October 1st, in the conversation between Hall and Eastman and myself, at Eastman's residence, Eastman said the $300 was for the calves that were supposed to be lost. There were 20 head of calves lost during the 1924 storm upon the hill and they were found dead by hunters up there on the hill. The company charged Hall up with $300 for those calves'' (Trans., pp. 62-63).

''The Court

''I think it is apparent from Mr. Bartholomew's testimony, as the record now stands, that $1400 was for the back rent and $300 was for the loss of the calves and that that is the reason the check was drawn for $2800.''

''L. C. Eastman

''I reside and have resided in Inverness, Marin County, for five and a half years, during all of which time I have been, and now am, the superintendent of the defendant company.

''I know Mr. William T. Hall, who is the present tenant of the 'N' Ranch. His tenancy began

on October 1, 1925, under a written lease (This lease is set out in full in the transcript, and provides for a term commencing with Oct. 1, 1925, and ending Sept. 30, 1926, at a rental of $2200, plus some calves. It also states that a part of the consideration for the lease is the payment of $1764.25 by Hall)" (Trans., pp. 37-40). * * *

"When the lease was signed, I received $1764.25 from Mr. Hall, by check, payable to the order of the defendant. This payment was made as a consideration for his obtaining the lease, and was based on the $1464.25 which was still due from Bartholomew, and $300 based on the fact that the rental of the ranch had to be reduced from $2500 to $2200, and the run-down condition of the ranch. The normal cash rental of the ranch was $2500 but Hall would only pay us $2200. That made a difference of $300. * * * I told Hall he could have the lease on October 1st, but he would have to pay the company $1764.25. * * * Judge Slack told Bartholomew that he did not seem to be getting along very well on the ranch, and things were becoming so run-down and in such a shape that he would have to get off. * * * When Judge Slack and I came out to the ranch, we looked around the buildings, and, as a result of our visit, I proceeded to make repairs, and probably a week or two later I had a man on the ranch to do some painting and repairing of the fences and gates and cleaning up in general. I could get Bartholomew to do very little in the way of repairs or cleaning up of the property" (Trans., pp. 40-42).

"I recall that Judge Slack left the state about the 12th or 14th of September, and returned on September 28th. During that time, Hall called upon me with reference to leasing the ranch. He first called about September 17th, and asked me, if he bought out Bartholomew, would he have a lease on the 'N' Ranch. I told him that Judge

Slack was in the East and that I would take it up with him as soon as he returned. I did not, at that time, say anything to Hall about what he or anyone else who took a new lease of the ranch would have to pay as a consideration for the lease" (Trans., p. 43).

"After Judge Slack returned, I told Hall that he could have the lease on October 1st, by paying the defendant $1700. The day the lease was to expire, Hall told me that the ranch was in such condition that he felt that all he would be willing to pay would be $2200, instead of the regular rent of $2500. * * * I told him that I would take the matter up with Judge Slack, and I did so. As a result of my conversation with Judge Slack, I told Hall that he could have the ranch for a rental of $2200 by paying $1700, or a little over, as consideration for the new lease to him. * * * I told Hall not to pay Bartholomew any money, that he was very heavily in debt, and that any money that he would get from the sale of his equipment would have to go to the creditors. * * *

"During the month of September, I told Bartholomew that he must do his best to find a new tenant before the lease expired. My last conversation with him of that sort was on the night of September 30th. On that occasion I asked Bartholomew if he had sold, or had made any deal, or if he settled any deal for selling out the ranch to Hall. He said he had not. I advised him to go that night and come to some terms of settlement with Hall while he still had a lease on the place, because the next day his lease would be expired and I told him that, if I were in his place, I would certainly go that night and come to the best terms possible" (Trans., p. 43).

"I next saw Bartholomew on the following morning, October 1st, at my house. Hall was also there. * * * On that occasion this lease * * * was

signed. * * * I particularly called his attention to the provisions on the first page that he should pay the defendant $1764.25 as a consideration for the lease. * * * Hall gave me the check for $1764.25. Bartholomew was present at the time. * * * Hall and Bartholomew had some discussion about the purchase by Hall of the remainder of Bartholomew's personal property on the ranch. Hall told Bartholomew that he was not going to give him—I think he mentioned $4500, or something of that sort. He said he was asking too much for the ranch, and that he was not going to give him as much as he asked for it. Hall said that he would not pay altogether more than $4500. * * * On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling price further. They were discussing it as they left the house. * * *'' (Trans., pp. 42-44). ''I instructed Hall not to pay over any money to Bartholomew for the reason that he owed all the local merchants quite a bit of money'' (Trans., p. 45).

''At one time during my talk with Hall, I told him he must pay $1700 to get the lease. I told Hall that Judge Slack would give him the lease provided that he would pay to the Shafter Estate Company $1700, that was on account of a little over $1400 that Bartholomew owed us for back rent. * * * No consideration was required for the lease which I made with Bartholomew, which expired on October 1st. On October 1st, in the morning, Hall and Bartholomew and I met at my house. The lease, which I had at my house at that time, was signed by Hall and he gave me a check for $1764.25. As they left my house, Hall and Bartholomew were discussing the price at which Bartholomew would sell to Hall the equipment that he, Bartholomew owned. Hall said that he would give Bartholomew what he was asking—I have forgotten just how he mentioned the price, or just what the price was.

Q. Is it not a fact that what was said was this: Bartholomew was asking $6500 and Hall said he would not give more than $4500. A. That may have been it. * * *

"I only attended the first meeting of the creditors on behalf of the Shafter Estate. At that meeting I may possibly have said that the defendant would have a claim for rent $1400, which would have to be paid pro rata out of the $2800. I am not positive that I said that. I have a faint recollection of saying it, however. We did not make any claim to the creditors on this fund. I may have said that we had power to make a claim, or indicated that we had the power to make a claim for $1400, if we wanted to, but I did not make any claim, or put in any claim for the $1400. I had no intention of putting in any claim" (Trans., pp. 47-48).

"William T. Hall

"I am the tenant of the 'N' Ranch, owned by the defendant, under a lease signed October 1, 1925. * * * The first talk I had with Bartholomew about getting a tenant, or becoming a tenant of the 'N' Ranch, was in the early part of September. He told me the ranch was for sale, and if I knew of a buyer to send him out. Soon afterwards I made an investigation to see whether or not I could lease the property. In his first talk with me Bartholomew said the ranch was worth about $6500. When I thought about trying to get a lease on the ranch, I went out to look at the property" (Trans., pp. 48-49).

"I asked Mr. Eastman whether or not, if I agreed with Bartholomew to buy him out, I would be accepted by the company as a tenant. * * * About the terms of the lease, I offered $2200 a year, instead of the $2500 which Bartholomew had paid. Mr. Eastman told me there was a

claim of $1700 odd before the ranch would be leased again. He said I would have to pay it, or whoever took the ranch would have to pay this money in order to get a new lease. * * * Mr. Eastman told me I could have the ranch on September 30th on those terms if Bartholomew left. I saw Bartholomew the next morning after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the signing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to his creditors. I told him that $4500 was as much as I would be willing to pay out on the deal. I knew I had to pay $1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was $4500. * * * Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of his property, or what price I would pay for it. * * * At the time of signing the lease we tried to agree and settle it right there but when we saw that we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price that I should pay. * * * When I arrived at Martinelli's store, which is only a short distance from Mr. Eastman's residence, Bartholomew and I talked further about the personal property that was left on the ranch belonging to Bartholomew. The difference between $4500 and what I had to pay the defendant, $1764.25, amounted to $2700 odd, something less than $2800. Mr. Martinelli took a hand in the discussion about that time. He asked me if I would not make it $2800, to make it round numbers. I told Mr. Martinelli that I would do so,

and then he drew up the bill of sale" (Trans., pp. 50-53).

"CHARLES W. SLACK

"I am an attorney at law, residing in San Francisco. I am the vice-president and general manager of the defendant company. * * * It has always been a custom of the company to make leases for the term of one year, and these have been renewed from time to time, if the tenants are satisfactory. * * * I had some acquaintance with Bartholomew about 1920, 1921, perhaps 1922, somewhere along there. Previous to the lease from October, 1924, to September 30, 1925, he had a lease of the same property, that is the ranch and the cattle then on the property, in conjunction with another tenant. There was a lease in 1922 to Bartholomew and a man by the name of Rainey. At the expiration of that lease, Rainey, so they told us, sold out to Bartholomew, and another lease was made to Bartholomew that lasted for another year, and then the lease in question about September, 1924, to Bartholomew alone for another year. The lease to Hall, dated October 1, 1925, was prepared by me. It was negotiated by Mr. Eastman, the superintendent of the properties. I fixed the amount of the consideration named in the lease on the basis of $1464.25, the back rent, which we have been unable to collect from Bartholomew, and the $300 difference between that sum and the amount specified in the lease as a consideration, was due to the fact that the normal cash rent of the property was and had been for some time $2500 a year. Hall, by reason of the run-down condition of the property and the loss—missing—of a whole herd of stock, besides other stock, refused to pay more than $2200. That established for the time being, and for some time in the future, the cash rent of $2200. Consequently, the difference for one year, to-wit: $300, was added on, by my insistence, to the cash

consideration which Hall or anybody else would have to pay for getting the lease" (Trans., pp. 57-58).

"I fixed first, the amount of the back rent as the basis for a consideration of giving a lease to Hall or anybody else. Later on when Hall offered the $2200, then $300 was added by me to the amount which was then fixed and known for Bartholomew's unpaid rent, making all told $1764.25" (Trans., p. 58).

"I was familiar, in a general way, with the property that was on the ranch. It would have a great deal more value on the ranch than if removed therefrom. I should say that 50 per cent of the value was in the retention of the property on the ranch, as against the removal of the property from the ranch. The property outside the livestock, the horses and the hogs, would have practically no value, not more than 50 per cent, off the ranch. It had a value in place because the tenant could come in and use it there, and therefore it had a larger value in place than it would have off the ranch" (Trans., pp. 60-61).

"We never, in any other instance, exacted any cash consideration for a lease, because a case of this kind never arose before. The rent had always been paid, even in the other two cases I have mentioned, where tenants were told that when their lease expired, they could not have a renewal. The schedules in Bankruptcy show that the debts of Bartholomew, including our own claim, amounted to about $9000.00."

It is apparent, from a consideration of the testimony, that the situation was this:

Bartholomew held a year's lease on one of the defendant's ranches at a rental of $2500 which was

about to expire and which the defendant would not renew. He owned the equipment on the ranch. He owed the defendant $1464.25 for back rent which he could not pay, and he says they also claimed an additional $300 from him for loss of stock. He owed about $9000.00 to creditors. Hall wanted to take the ranch over. It was to his interest to buy Bartholomew's equipment because he could get it cheaper than if he had to install new or other equipment. It was to the interest of Bartholomew to sell to Hall because he would get much more than if he moved the equipment off the ranch and sold elsewhere. The defendant was willing to let Hall have the lease and take over the equipment provided that out of the proceeds the defendant would be paid its old bill against Bartholomew. This, in spite of the fact that Bartholomew was hopelessly insolvent to the knowledge of the defendant's agents. The condition was agreeable to Hall provided he did not have to pay more than $4500, and to Bartholomew because of the necessities of the case which left him nothing else to do. If he did not consent, he would have to move off the ranch with his equipment for which he would be able to get little or nothing.

Mr. Eastman, the superintendent of the company, was quite frank about it. He told Bartholomew and Hall that Hall could have the lease, and that the deal between Hall and Bartholomew for the sale of the equipment could be consummated, provided that the back bill against Bartholomew for the $1764.25 was

paid. Judge Slack, an attorney, and defendant's general manager, was more subtle and ingenuous. He said Hall could have the lease provided he paid as a consideration therefor this sum of $1764.25.

There was no reason whatever for Hall paying any consideration out of his own pocket to secure the lease. All admitted that the ranch was in a run-down condition, and, for this reason, the defendant reduced the rent to Hall to $2200 from the $2500 charged Bartholomew. The lease had no value over and above the $2200 rent, so why should Hall pay an additional sum of $1764.25? No consideration other than the usual annual rental had ever been exacted before by the defendant from its tenants. So why was it so termed and exacted in this case? Simply to enable the defendant, with its general unsecured claim for $1764.25, to secure full payment of the same instead of being compelled to accept a pro rata like the other creditors of the same class.

The defendant took advantage of the necessities of Bartholomew, who had to act quickly, and forced him to pay off their bill in preference to other bills. Bartholomew had no choice. If he did not consent to this arrangement, the deal would be off, that is to say, Hall would not get a lease and would not want Bartholomew's equipment, and the latter would have to move it off the ranch and practically junk it.

It made no difference whether Hall paid the whole $4500 to Bartholomew and Bartholomew then paid

the $1764.25 to the defendant, or whether, as was actually done, the $1764.25 was paid direct by Hall to defendant. The effect of the transaction was the same either way, for, as we have seen from *Dean v. Davis*, supra, mere circuity of arrangement will not save a transfer that is otherwise a preference.

We have no quarrel to make with the authorities cited by defendant, in its brief, as to the nature of a voidable preference, that is to say, the property transferred must be property of the bankrupt and his estate must be diminished thereby. There is no question but that is the law. In the case at bar, however, it is plain that the effect of the transaction was to transfer property of the bankrupt—a portion of the proceeds of the sale of his equipment—to the defendant in preference to other creditors. The labelling of the transfer as "consideration for the lease" does not rob it of its real nature, and clever counsel cannot whitewash a preference by the mere use of words.

The only possible theory upon which defendant could maintain its right to retain this money would be that Hall was willing to pay $1764.25, in addition to the $2200 yearly rental, in order to obtain a lease for a year, irrespective of whether or not he purchased the equipment from Bartholomew. There is not a word of evidence to support such a theory, and all of the evidence is directly to the contrary. Hall wanted to buy the equipment, but, of course, he did not want the equipment without a lease. He was not willing to

pay as much for a year's lease as Bartholomew did, and a concession was made of $300 on account of the run-down condition of the ranch, a condition that was admitted by all. Why should Hall pay, as contended by defendant, $3964.25 to the defendant for the privilege of renting the ranch for a year, when it was in such a run-down condition that the defendant conceded its actual cash rental value for the year was only $2200, instead of the $2500 that had been charged Bartholomew? Suppose the sale of the equipment had not been involved, and that all Hall wanted was the lease, Bartholomew to move off the equipment and dispose of it as best he might. Will it be contended for a moment that Hall would have paid $3964.25, that is to say, the normal cash rental of the place for one year plus the $1764.25 claimed against Bartholomew, just for a year's lease of the place without the equipment? And yet that is the absurd conclusion that must be reached if we are to decide that the $1764.25 did not, at least indirectly, come out of Bartholomew's property—his interest in the proceeds of the sale of the equipment. Hall did not care who got the money. He wanted the lease from the defendant and the equipment from Bartholomew. He was willing to pay the defendant $2200, and no more, for the lease, and $4500, and no more, for the equipment, and if there was a back bill due from Bartholomew to the defendant to be taken care of, that must come out of the $4500.

Defendant tried to make it appear at the trial, and contends in its brief, that there was no sale of this

equipment between Bartholomew and Hall until after Hall's new lease had been signed, and he had paid the defendant the $1764.25 as "consideration for the lease." Counsel for defendant, cleverly caused Hall to make this statement (Trans., p. 51):

> "Up to the time when I signed the lease, I had reached no conclusion with Bartholomew as to whether or not I would take the remainder of the property, or what price I would pay for it."

Then counsel, in order to try to make this statement still stronger, asked the following question, which elicited the following answer (Trans., p. 51):

> "Q. I think you testified, Mr. Hall, that you and Bartholomew had some talk, either before or after the lease was signed on October 1st, about submitting the proposition of how much should be paid to Bartholomew if you bought the property. You did have such a talk with him, did you?
>
> "A. At the time of signing the lease we tried to agree and settle it right there but when we saw we could not agree and it was time to take the lease we agreed that I sign the lease and square with the company and then if we could not agree we would appear before the creditors and sort of let the creditors decide the price I should pay."

This, of course, put a different version upon the previous statement of Hall, and was, in a sense, a correction thereof, and more in keeping with the rest of the evidence in the record, particularly that of Bartholomew (Trans., p. 26):

> "I went down that morning (Oct. 1st) to Inverness, and I met Mr. Hall and Mr. Eastman

down there. Mr. Eastman asked me to go up to his house with Mr. Hall. We went up there. Mr. Hall asked me if I wanted to give him the place for the money. I told him he might as well have it, I guess, or something like that."

Also that of Eastman (Trans., p. 44):

"On that occasion, at my residence, Hall and Bartholomew left my house to discuss the selling price further. They were discussing it as they left the house."

Trans., p. 47:

"As they left my house, Hall and Bartholomew were discussing the price at which Bartholomew would sell to Hall the equipment that he, Bartholomew, owned. Hall said that he would give Bartholomew what he was asking."

Also that of Hall (Trans., p. 51):

"I saw Bartholomew the next morning, after his lease had expired. I went out to his ranch and saw him there. It was understood that I was to have the ranch, and his lease had expired, and we were to go to Mr. Eastman to prepare for the signing of a new lease. Bartholomew did not seem very much interested in how much he got—it was to go to the creditors. I told him that $4500 was as much as I would be willing to pay out on the deal. I knew I had to pay $1764.25 to the defendant to get the lease, and all I wanted to pay out on the deal was $4500. I told Bartholomew that."

The record shows plainly that, on the morning of October 1st, both before and after the lease was signed, it was understood between Bartholomew and Hall that Hall was to have the equipment and that

the only dispute was how much Hall was to pay for the same. The bill of sale made out and signed at Martinelli's store referred to the "net sum" of $2800, which clearly meant the surplus left after the payment of the $1764.25 to the defendant.

Counsel for defendant, on page 25 of its brief, challenge us to show any change in Bartholomew's position, or in his assets, which resulted from the payment by Hall to the defendant of the $1764.25 and the execution of the lease. We accept this challenge. Bartholomew's assets, that is to say, the proceeds of the sale of the equipment by Bartholomew to Hall for $4500, were depleted to the extent of $1764.25 which would have been paid direct by Hall to Bartholomew as a part of the $4500 purchase price of the equipment, if the defendant had not held up Bartholomew at the point of a gun and made it a condition of the giving of the lease to Hall—if Hall did not get a lease there would be no sale of the equipment—that its back bill of $1764.25 against Bartholomew be paid out of the proceeds of the sale. All that was coming to the defendant from Hall was the $2200 year rental specified in the lease. Hall did not owe defendant $1764.25 as "consideration for the lease" or for any other purpose. The lease had no "consideration" value. In fact, its actual value was less than it was the year previous, when no "consideration" was exacted. And it is a certainty that Hall would not have taken the lease, and paid the $2200 year rental, and the $1764.25, making a total of $3964.25, unless he got the equipment

also, because the lease had no value of itself beyond the year rental price.

Courts cannot permit to be done by indirection what the law forbids to be directly done, and, without regard to form, they consider the purpose and effect of the transaction however devious the ways by which it was accomplished. If a transaction was entered into for the purpose of indirectly evading the provisions of the act and procuring an undue preference to the creditor, it is voidable.

> *Collier on Bankruptcy,* (13th Ed.) p. 1267, and cases cited.

And that is exactly what happened in the case at bar. The other elements of a voidable preference were present, and the fact that the payment was made by Hall to the defendant, instead of first to Bartholomew and then by him to the defendant, does not validate the payment.

> "To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it. A 'transfer' includes
>
> > 'the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security.'

"It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The 'accounts receivable' of the debtor, that is, the amounts owing to him on open account, are, of course, as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter's debt—or he collects the amount and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent, and is simply complying with the directions of the latter in paying the money to his creditor."

National Bank of Newport v. National Herkimer County Bank, 225 U. S. 178, 184; 28 Am. B. R. 218; 56 Law. Ed. 1042; 32 Sup. Ct. 633.

The distinction between *In re Pearson,* 95 Fed. 425, cited by counsel for defendant in its brief, and the case at bar, is that in that case there was a sale of a lease that had three years to run and had a value in itself, while in the case at bar no lease was sold. Bartholomew's lease had run out, and all he had to sell was his equipment. In that case, the purchaser of the lease would have had to pay up the back

rent in order to keep the lease for, otherwise, the landlord could have dispossessed him, and it was immaterial whether this back rent was paid by the bankrupt out of the purchase price or the amount thereof was deducted from the purchase price and paid direct to the landlord. No such situation exists in the case at bar because Bartholomew had no lease to transfer, and the defendant had no hold upon Bartholomew for the unpaid rent except by way of preventing the sale of his equipment until that was paid. In the case cited, the landlord was, in a sense, a secured creditor because he could enforce payment of his claim through the terms of the lease, but in the case at bar the landlord was simply an unsecured creditor as to its claim against Bartholomew because there was no longer any lease for it to work upon.

CONCLUSION.

We have omitted citing many authorities, because we believe that the record speaks for itself in this case, that is to say, that it is apparent the defendant, through the ingenuity of counsel, accomplished a preference by indirection and then tried to whitewash the whole affair under the guise of "consideration" for a lease that had no "consideration" value.

Respectfully submitted,

REUBEN G. HUNT,
Attorney for Defendant in Error.